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Public Prosecutor v Hariswaran a/l Vasu Devan & Ors

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HIGH COURT (PENANG) — CRIMINAL TRIAL NO 45A-10–04 OF 2016
LIM CHONG FONG J
30 JANUARY 2018

C

Criminal Law — Dangerous drugs — Trafficking in dangerous drugs — Heroin — Monoacetylmorphines — Cannabis — Custody, control and possession over drugs — Whether there was reasonable doubt in prosecutions case — Photographs of premises not tendered — Whether there was gap in prosecution's case — Dangerous Drugs Act 1952 ss 6, 12(3), 34 & 39B(2)

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The first to third accused were jointly charged with trafficking in dangerous drugs under the Dangerous Drugs Act 1952. The three accused were arrested on 4 March 2014 in the living room of a double storey house in Bukit Mertajam, Pulau Pinang ('the premises'). The complainant, SP7 found suspected drugs on the floor of the living room at the first storey, inside the store room beneath the staircase and underneath the table on the second storey living room and in the right bedroom also situated on the second storey of the premises. Detective Lance Corporal Ahmad Zaki bin Kamarudin ('SP1') photographed the premises. On 7 March 2014, SP1 photographed all the marked case materials and later, SP1 again photographed the interior as well as exterior of the premises as directed by SP9. The prosecution submitted that the three accused persons had custody, control and possession of 124.4g of heroin, 271.11g of monoacetylmorphines and 10.95g of cannabis. The prosecution also submitted that it was improbable that there were others who had access to the premises. The defence however submitted that from the photographs in exh P7, no drugs were seen in the living room on the first storey of the premises. There were also no photographs tendered revealing the storeroom beneath the staircase in the first storey of the premises, the hall on the second storey and the right bedroom on the second floor of the premises where the suspected drugs were found and subsequently, the prosecution had failed to establish a prima facie case.

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Held, discharging and acquitting accused persons on first, second and third charges:

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(1) The failure of the police, particularly the raiding officer and investigating officer, in taking and tendering photographs that depicted the existence of all the drugs found and seized in the premises weakened the prosecution's case against the accused persons. No explanation was

proffered as to why there were several, but incomplete photographs taken. Consequently, SP7's testimony on the seized drugs were not credible or probable as there could have been a mix-up or tempering of the drugs found and seized from the premises (see para 41).

(2) There was reasonable doubt in the prosecution's case due to the absence of satisfactory affirmative proof and exact accounting if the drugs seized from the premises which were eventually analysed and formed the basis of the charge. The exact and true amount of the drugs seized were indeterminate. There was a serious break in the chain of evidence led by the prosecution which had a grave consequence. It was unsafe to charge or convict the accused persons on the evidence adduced by the prosecution on the identification of the drugs (see paras 42–43).

(3) There was a gap in the prosecution's case. The first element of the offence on the identity of the drugs were not satisfactorily established by the prosecution under maximum evaluation. As a result, it was unnecessary for the learned judge to make further findings on the second and third elements of the offence on possession and trafficking of the drugs in respect of the three charges (see paras 45–46).

[Bahasa Malaysia summary

Tertuduh pertama hingga ketiga dituduh bersama kerana mengedar dadah berbahaya di bawah Akta Dadah Berbahaya 1952. Ketiga-tiga tertuduh telah ditangkap pada 4 Mac 2014 di bilik ruang tamu rumah dua tingkat di Bukit Mertajam, Pulau Pinang ('premis tersebut'). Pengadu, SP7, telah menjumpai dadah yang disyaki atas lantai bilik ruang tamu di tingkat pertama, dalam bilik stor di bawah tangga dan di bawah meja di bilik ruang tamu tingkat kedua dan bilik tidur di sebelah kanan yang juga terletak di tingkat kedua premis tersebut. Detektif Lans Korporal Ahmad Zaki bin Kamarudin ('SP1') telah mengambil gambar premis tersebut. Pada 7 Mac 2014, SP1 telah mengambil gambar semua bahan kes yang ditanda dan kemudian, SP1 sekali lagi telah mengambil gambar dalaman dan juga luaran premis tersebut sepertimana diarahkan oleh SP9. Pendakwaan berhujah abhawa ketiga-tiga tertuduh mempunyai jagaan, kawalan dan milikan 124.4.g heroin, 271.11g monoacetylmorphines dan 10.95g kanabis. Pendakwaan juga berhujah bahawa ia tidak mungkin untuk orang lain mempunyai akses kepada premis tersebut. Pembelaan bagaimanapun berhujah bahawa daripada gambar foto dalam eksh P7, tiada dadah kelihatan di bilik ruang tamu di tingkat pertama premis tersebut. Tiada juga gambar foto yang ditenderkan menunjukkan bilik stor di bawah tangga di tingkat pertama premis tersebut, ruang di tingkat kedua dan bilik tidur sebelah kanan di tingkat kedua premis tersebut di mana dadah disyaki telah dijumpai dan oleh demikian, pendakwaan telah gagal membuktikan kes prima facie.

Diputuskan, melepas dan membebaskan mereka yang tertuduh atas pertuduhan-pertuduhan pertama, kedua dan ketiga:

(1) Kegagalan polis, terutamanya pegawai serbuan dan pegawai siasatan, dalam mengambil dan menender gambar-gambar foto yang menggambarkan kewujudan semua dadah yang dijumpai dan dirampas di premis tersebut telah melemahkan kes pendakwaan terhadap ketiga-tiga tertuduh. Tiada penjelasan telah diberikan berhubung hanya beberapa, dan gambar foto yang tidak cukup diambil. Akibatnya, keterangan SP7 berhubung dadah yang dirampas tidak boleh dipercayai atau berkemunginan kerana dadah yang dijumpai dan dirampas daripada premis tersebut mungkin telah dicampur aduk atau dibega (lihat perenggan 41).

(2) Terdapat keraguan munasabah dalam kes pendakwaan akibat ketiadaan bukti positif yang memuaskan dan pengiraan tepat jika dadah yang dirampas dari premis tersebut yang telahpun akhirnya dianalisis dan membentuk asas pertuduhan. Jumlah sebenar dan tepat dadah yang dirampas tidak dapat ditentukan, Terdapat rantaian keterangan yang terputus oleh pendakwaan menyebabkan akibat yang serius. Ia tidak selamat untuk menuduh atau mensabitkan tertuduh-tertuduh atas keterangan yang dikemukakan oleh pendakwaan berhubung pengenalpastian dadah itu (lihat perenggan 42–43).

(3) Terdapat jurang dalam kes pendakwaan. Elemen pertama kesalahan berhubung identiti dadah itu tidak dibuktikan dengan memuaskan oleh pendakwaan di bawah penilaian maksimum. Akibatnya, ia tidak perlu untuk hakim yang bijaksana membuat dapatan selanjutnya berhubung elemen-elemen kedua dan ketiga berhubung kesalahan milikan dan pengedaran dadah berkaitan ketiga-tiga pertuduhan tersebut (lihat perenggan 45–46).]

Notes

For cases on trafficking in dangerous drugs, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 976–980.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 AMR 321, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
Karthi a/l Gopal v PP [2016] 5 MLJ 274, CA (refd)
Lee Boon Siah & Ors v PP and other appeals [2014] 2 MLJ 652; [2014] 3 CLJ 584, CA (refd)
Lim Son Heng v PP [2014] 6 MLJ 109, CA (refd)
Mohd Zaidy Adenan v PP [2012] 9 CLJ 803, HC (folld)
Mohan Singh a/l Lachman Singh v PP [2002] 3 MLJ 291; [2002] 3 CLJ 293, CA (refd)
Muhammad Nazir bin Jamaludin lwn Pendakwa Raya [2011] 2 MLJ 311, CA (refd)
Noor Shariful Rizal bin Noor Zawawi v PP [2017] 3 MLJ 460, CA (refd)

Ooi Chee Seong & Anor v PP [2014] 3 MLJ 593; [2014] 7 CLJ 505, CA (refd)
PP v Ahmad Nashiri Abdul Razak [2014] 7 CLJ 749, CA (refd)
PP v Chang Kok Foo [2016] 7 MLJ 67; [2015] 1 LNS 481, HC (refd)
Pendakwa Raya v Davoud Fotoohigharehmasjed Shaban [2012] MLJU 1122; [2013] 1 CLJ 249, HC (refd)
PP lwn Mazlan Mustaffa [2011] 1 CLJ 964, CA (refd)
Pendakwa Raya v Mohd Khalid bin Abd Rahman and others [2004] 1 LNS 578, HC (refd)
PP v Mohd Radzi Abu Bakar [2006] 1 CLJ 457, FC (refd)
PP v Wong Moy [1988] 3 MLJ 280; [1988] 2 CLJ 521, HC (folld)
PP v Yaw Kim Liong & Anor [2011] 1 LNS 1857, HC (refd)
PP v Kua Tiong Ann [2015] 4 MLJevi 168; [2009] 7 AMR 788, HC (refd)
Pendakwa Raya lwn Teyo Yen Leong dan rayuan-rayuan lain [2017] 8 MLJ 636, HC (refd)
PP v Anya Michael Onyedikachi [2017] MLJU 371, HC (refd)
Saludin bin Surif v PP [1997] 3 MLJ 317, CA (refd)
Shreedharan a/l Thankamani v PP [2016] MLJU 1695, CA (refd)
Teoh Hoe Chye v PP; Yeap Teong Tean v PP [1987] 1 MLJ 220, SC (refd)
Zaifull bin Muhammad v PP and another appeal [2013] 2 MLJ 348; [2013] 2 CLJ 383, FC (refd)

Legislation referred to

Criminal Procedure Code s 180
DNA (Identification) Act 2009 ss 2, 14
Dangerous Drugs Act 1952 ss 6, 12, 37(d), 37(da), 39B, First Schedule
Evidence Act 1950 s 114(g)

Amir Hamdzah Othman (Legal Officer, Pulau Pinang Legal Advisors Office) for the prosecution.
Hussaini bin Abd Rashid (Hussaini & Co) for the defendant.

Lim Chong Fong J:

PRELIMINARY

[1] The first to third accused, Hariswaran a/l Vasudevan, Saravanan a/l Jaganathan and Ragu a/l Balakrishnan were jointly charged with trafficking in dangerous drugs as follows:

> First Charge
>
> Bahawa kamu bersama-sama pada 4/3/2014 jam lebih kurang 10.45 malam, bertempat di alamat no. 6 Lorong Seri Impian 7, Alma, Bukit Mertajam dalam daerah Seberang Perai Tengah dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya iaitu (Heroin seberat 124.24 gram dan Monoacetylmorphines seberat 271.11 gram) seberat 395.34 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh

dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca Seksyen 34 Kanun keseksaan.

Hukuman: Jika disabitkan dengan kesalahan hendaklah dijatuhkan hukuman mati.

Second Charge

Bahawa kamu bersama-sama pada 4/3/2014 jam lebih kurang 10.45 malam, bertempat di alamat no 6 Lorong Seri Impian 7, Alma, Bukit Mertajam dalam daerah Seberang Perai Tengah dalam Negeri Pulau Pinang, telah didapati dalam milikan kamu dadah jenis Cannabis seberat 10.95 gram. Oleh itu kamu telah melakukan satu kesalahan di bawah Seksyen 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 6 Akta yang sama dan di baca bersama Seksyen 34 Kanun Keseksaan.

Hukuman: Jika disabitkan dengan kesalahan hendaklah didenda tidak melebihi dua puluh ribu ringgit atau dihukum penjara selama tempoh tidak lebih daripada lima tahun atau kedua-duanya sekali.

Third Charge

Bahawa kamu bersama-sama pada 4/3/2014 jam lebih kurang 10.45 malam, bertempat di alamat no. 6 Lorong Seri Impian 7, Alma, Bukit Mertajam dalam daerah Seberang Perai Tengah dalam Negeri Pulau Pinang, telah didapati dalam milikan kamu dadah jenis Methamphetamine seberat 0.76 gram. Oleh itu kamu telah melakukan satu kesalahan di bawah Seksyen 12 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 12(3) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

Hukuman: Jika disabitkan dengan kesalahan hendaklah didenda tidak melebihi dua puluh ribu ringgit atau dihukum penjara selama tempoh tidak lebih daripada lima tahun atau kedua-duanya sekali.

[2] The trial of the prosecution's case took eight days on 6 and 7 December 2016, 21, 22 and 23 March 2017, 3, 4 and 5 July 2017. During the course of the trial, exhs P1–D305 were admitted in evidence.

[3] The prosecution called the following witnesses:

(a) Detective Lance Corporal Ahmad Zaki bin Kamarudin ('SP1'), photographer of the case materials;

(b) Tan Young Kang ('SP2'), owner of house No 6 Lorong Seri Impian 7, Taman Seri Impian, Alma, Bukit Mertajam;

(c) Mawarni bt Abdul Rahman ('SP3'), science officer at the Department of Chemistry Malaysia, Penang Branch:

(d) Afizawati @ Halimah bt Ayub ('SP4'), chemist at the Department of Chemistry Malaysia, Penang Branch;

(e) Detective Sergeant Taufik bin Abd Mutalib ('SP5'), raiding officer of the case;

(f) Assistant Superintendent Yusmar bin Hj Salim ('SP6'), raiding officer of the case;

(g) Assistant Superintendent Lim Wei Yih ('SP7'), chief raiding officer of the case;

(h) Sergeant Abdullah bin Saaid ('SP8'), storekeeper of the raided case materials; and

(i) Inspector Haslina bt Hamzah ('SP9'), investigating officer of the case ('IO').

[4] After the trial and having read the written submissions, I heard oral argument of counsel on 23 August 2017, 17 November 2017 and 5 January 2018.

THE PROSECUTION'S CASE

[5] On 4 March 2014 the complainant SP7 who acted on information received pertaining to drug processing together with his raiding team conducted a raid at a double storey house bearing postal address No 6, Lorong Seri Impian 7, Alma, Bukit Mertajam, Penang ('premises'). Upon their arrival at the premises at about 9.15pm, they stood watched from the outside for about 1 1/2 hours.

[6] At about 10.45pm when the inner main door of the premises was opened, the raiding team confronted the person who opened it. It was Hariswaran a/l Vasu ('first accused') who opened the main door of the premises. Saravanan a/l Jaganathan ('second accused') stood next to him. After identifying himself as the police, SP7 and several members of his team entered into the living room of the premises. The first accused and second accused as well as Ragu a/l Balakrishnan ('third accused') who was in the living room of the premises were arrested and handcuffed. There was neither resistance nor scuffle by the three accused persons.

[7] SP7 carried out body search on all the three accused but did not yield anything incriminating. He then searched the premises witnessed by the three accused. He found suspected drugs on the floor of the living room at the first storey (ground floor), inside the store room beneath the staircase at the first storey, on and underneath the table and on the floor in the living room at the second storey (upper floor) and in the right bedroom at the second storey of the premises.

[8] At about 11.30pm, SP6 and his forensic team arrived at the premises. Thereafter SP7 and SP6 began marking the case exhibits. SP9 and SP1 then arrived together at the premises and SP1 photographed the interior as well as

the exterior of the premises and case materials as directed by SP9 and SP6. The album of the photographs taken is marked as exh P7 (photos 1–27). The case materials relating to the suspected drugs were marked as follows by SP7:

(a) floor of the living room at the first storey: A1–A9;

(b) store room beneath the staircase at the first storey: B1–B4;

(c) table top and beneath and on the floor in the hall at the second storey: C1–C52; and

(d) right bedroom at the second storey: D1–D19.

[9] All of the men left the premises at about 4am on 5 March 2014. SP7 brought along the case materials particularly the suspected drugs that were seized with him to the Ibu Pejabat Polis Daerah Seberang Perai Tengah and handed them over to SP9. The search list and handing over list are marked as exhs P286 and P296 respectively. SP7 also lodged Machang Bubuk police report No 1067–1068/14 which is marked as exh P295.

[10] On 6 March 2014 at about 9.15am, SP6 handed over to SP9 the case materials seized by him that included clothing, gloves, towels and cigarette butts. The handing over list is marked as exh P285.

[11] SP9 then marked all the case materials. On 7 March 2014 at 9.30am, SP1 photographed all the marked case materials as directed by SP9. The album of the photographs taken is marked as P8 (photos 1–72). Thereafter SP9 brought all the three accused persons to the Hospital Bukit Mertajam to have samples of their blood taken for DNA comparison purposes. Later that day at 3pm, SP9 and SP1 went together again to the premises to conduct further searches. SP1 again photographed the interior as well as the exterior of the premises as directed by SP9. The album of the photographs taken is marked as P9 (photos 1–23).

[12] On 12 March 2014 at about 12 pm, SP9 went over to the Jabatan Kimia Malaysia and handed over certain of the case materials particularly the suspected drugs to SP4 for chemical testing and analysis as well as certain other case materials and the blood samples of all the accused persons to SP3 for DNA testing and analysis. The handing over forms are marked as exhs P40 and P14 respectively.

[13] After testing and analysis of the case materials, SP3 and SP4 produced their respective reports and handed them together with the case materials back to SP9 on 9 December 2015 and January 2016. The reports are marked as exhs P41 and P15 respectively.

[14] According to the prosecution, SP4 has confirmed that the analysis of the case materials revealed presence of dangerous drugs as defined in the Dangerous Drugs Act 1952, to wit: 124.24g of heroin, 271.11g of monoacetylmorphines and 10.95g of cannabis ('drugs').

[15] In addition the prosecution submitted that all three accused persons had custody, control and possession of the drugs in the premises. Reliance is made on the Court of Appeal case of *Lim Son Heng v Public Prosecutor* [2014] 6 MLJ 109 where the accused was found guilty for having care and management of the drugs in the raided premises.

[16] In this respect, the prosecution submitted that it is improbable that there were others who had access to the premises because SP7 and his team monitored the premises for a while before raiding it. During the period of monitoring, there was no one who entered or left the premises. The keys to the premises were with the first accused. Only the three accused persons were found in the premises in the raid and SP3 confirmed that the DNA of the three of them were found on the gloves, face masks, clothes and towels seized from the premises during the raid. In addition, SP9 also later found a Maybank slip and business card bearing the name of the first accused as well as two SEC electric invoices bearing the name of the third accused in the premises.

[17] Consequently, the prosecution submitted as testified by SP7 that all the three accused persons were found together in the premises proximate to the drugs. By the provisions in ss 37(d) and 37(da) of the Dangerous Drugs Act 1952, the prosecution has therefore established a prima facie case against all three of them.

THE DEFENCE'S REPLY

[18] The defence submitted that in a serious case such the one herein on drug trafficking that carries mandatory death sentence upon conviction, it is paramount that the prosecution proves beyond any doubt that the suspected drugs recovered in the premises were the exact ones sent by the raiding officer to the IO and by the IO to the chemist and returned to the IO and finally brought by the IO before the court. This must be proved by both the documentary evidence adduced and testimony of witnesses and the chain of evidence must be strictly proved for affirmative identification of the drugs.

[19] This case involved numerous exhibits relating to the drugs which were allegedly found at four different locations in the premises. After analysis by SP4, the nett weight of the drugs ascertained from the marked exhibits seized in the premises are as follows:

(a) A1 (exh P45) contained 1.95g heroin and 0.58g monoacetylmorphines;

(b) A2 (exh P47) contained 4.26g heroin and 0.51g monacetylmorphines;

(c) A3 (exh P49) contained 10.95g cannabis;

(d) A4 (exh P51) contained 0.02g heroin and 0.19g methamphetamine;

(e) A5 (exh P 53) contained 0.57g methamphetamine;

(f) C1 (exh P84) contained 14.53g heroin and 4.82g monoacetylmorphines;

(g) C2 (exh P86) contained 0.65g monoacetlymorphines;

(h) C3 and C6 (exh P88) contained 1.61g heroin and 2.08g monoacetlymorphines in both;

(i) C4 (exh P91) contained 2.41g monoacetlymorphines;

(j) C7 (exh P95) contained 0.83g monoacetlymorphines;

(k) C8 (exh P97) contained 0.13g heroin and 0.17g monoacetlymorphines;

(l) C13 (exh P100) contained 5.19g monoacetlymorphines;

(m) C15 (exh P104) contained 2.07g heroin and 1.87g monoacetlymorphines;

(n) C16 (exh P112) contained 18.08g heroin and 43.02g monoacetylmorphines;

(o) C18 (exh P120) contained 0.92g heroin and 9.55g monoacetylmorphines;

(p) C20 (exh P123) contained 5.55g monoacetylmorphines;

(q) C22 (exh P128) contained 1.00g heroin and 14.05g monoacetylmorphines;

(r) C23 (exh P130) contained 0.62g heroin and 11.51g monoacetlymorphines;

(s) C24 (exh P133) contained 1.96g heroin and 7.31g monoacetylmorphines;

(t) C25 (exh P136) contained 1.70g heroin and 8.86g monoacetylmorphines;

(u) D16 (exh P174) contained 0.03g heroin and 0.11g monoacetylmorphines;

(v) D17 (exh P176) contained 0.06g heroin and 0.01g monoacetylmorphines;

(w) D2 (exh P185) contained 26.97g heroin and 147.11g monoacetylmorphines;

(x) D10 (exh P251) contained 48.22g heroin and 4.91g monoacetylmorphines; and

(y) C36 (exh P261) contained 0.11g heroin and 0.01g monoacetylmorphines.

They collectively totaled up to the quantity of the drugs framed in the three charges against the three accused persons.

[20] The defence submitted that from the photographs in exh P7 (1–27), no drugs were seen in the living room on the first storey of the premises. There is no photograph tendered revealing the storeroom beneath the staircase in the first storey of the premises where the suspected drugs were allegedly recovered. There were packages presumed to contain the suspected drugs on the table in the living room on the second storey seen in the photographs. These were however unmarked packages. Furthermore, there were no drugs seen beneath the table. Instead boxes were seen the contents of which were unknown. There is also no photographs tendered showing the hall in the second storey where the suspected drugs were allegedly found. Finally, there were no photographs of the right bedroom in the second storey of the premises where suspected drugs were also recovered.

Confronted with these shortcomings, the defence submitted that the prosecution failed to establish a prima facie case and referred to the cases of *Public Prosecutor v Wong Moy* [1988] 3 MLJ 280; [1988] 2 CLJ 521, *Public Prosecutor v Chang Kok Foo* [2016] 7 MLJ 67; [2015] 1 LNS 481, *Pendakwa Raya v Davoud Fotoohigharehmasjed Shaban* [2012] MLJU 1122; [2013] 1 CLJ 249, *Public Prosecutor v Yaw Kim Liong & Anor* [2011] 1 LNS 1587, *Mohd Zaidy Adenan v PP* [2012] 9 CLJ 803, *Pendakwa Raya v Mohd Khalid bin Abd Rahman and others* [2004] MLJU 637; [2004] 1 LNS 578 and *Mohan Singh a/l Lachman Singh v Public Prosecutor* [2002] 3 MLJ 291; [2002] 3 CLJ 293 in support of the proposition.

[21] That aside, the defence further submitted that all three accused persons did not have sole access and custody and control of the drugs. They were not involved in manufacturing or trafficking of the drugs.

[22] In this respect, the defence submitted that the premises was an occupied house as conceded to by SP7. In addition the photographs in exh P7 (1–27) revealed that the whole premises was filled with personal effects and belongings from school bags to bicycles and so forth. There were vehicles parked inside the compound as well as outside the compound of the premises. It had not been proved by the prosecution as to who owned these personal effects and belongings. SP9 as IO had no idea of it too. SP9 investigated on the ownership of the vehicles and conceded that they had access into the premises. The owners of these vehicles were not identified by the prosecution during the trial and the

defence referred to the case of *Pendakwa Raya lwn Teyo Yen Leong dan rayuan-rayuan lain* [2017] 8 MLJ 636.

[23] Moreover the defence submitted that SP2 the owner of the premises was unable to identify the three accused as the tenant or occupiers of the premises. According to SP2, the premises was rented to Murugeshan a/l Balakrishnan for one year by virtue of a tenancy agreement dated 15 April 2012. After the expiry of the tenancy, SP2 testified that the premises was rented to the brother of Murugeshan a/l Balakrishnan. A new tenancy agreement was executed but this was not produced in court. SP2 didn't know who banked the rent into his bank account. Both Murugeshan a/l Balakrishnan and Pushpa a/p Balakrishnan who witnessed the execution of the tenancy agreement were neither called to testify by the prosecution nor offered to the defence. In consequence, it was submitted that there is a gap in the prosecution case that attracted adverse inference pursuant to s 114(g) of the Evidence Act 1950.

In addition, the defence submitted that all the three accused persons did not live in the premises as confirmed by SP7 in his arrest report because they had different address in their identification documents.

As the result, the defence referred to the Court of Appeal case of *Ooi Chee Seong & Anor v Public Prosecutor* [2014] 3 MLJ 593; [2014] 7 CLJ 505 which is fatal to the prosecution's case if the person having care or management of the premises were not called and excluded from being associated with the drugs. SP7 agreed that he did not recover any document in the name of the accused persons from the premises. Hence, there was nothing to link them to the premises save for their mere presence there at the time of the raid.

[24] Consequently the defence submitted that lots of individuals had access, custody and control of the premises and SP9 agreed that anyone having access to the premises would have custody and control of the drugs. It is hence quite impossible to hold the accused persons as sole persons having access to the premises to the exclusion of others and this is fatal to the prosecution's case following the Supreme Court case of *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 and Federal Court case of *Muhammad Nazir bin Jamaludin lwn Pendakwa Raya* [2011] 2 MLJ 311. The defence also referred to the cases of *PP v Ahmad Nasshiri Abdul Razak* [2014] 7 CLJ 749, *Saludin bin Surif v Public Prosecutor* [1997] 3 MLJ 317 and *Public Prosecutor lwn Mazlan Mustaffa* [2011] 1 CLJ 964.

[25] As to the Maybank slip and business card bearing the name of the first accused as well as two SEC electric invoices bearing the name of the third accused in the premises recovered by SP9 and relied upon by the prosecution to suggest the accused persons were occupiers of the premises, the defence submitted that the retrieval of these documents permeated suspicion because

they were only found by SP9 several days later but not by the SP7 at the material time of the raid. Although the premises were locked after the raid and keys handed over to SP9, she agreed that other person having keys may be able to enter the premises. From the comparison of the photographs taken during the raid (exh P7 (1–27)) and during the retrieval of the aforesaid documents (exh P9 (1–23)), it is evident that the things in the premises had been moved during the intervening period. In the circumstances, the defence argued that these documents recovered by SP9 carried no evidential weight because they could have been planted by someone else.

As to the DNA positive identification of the accused persons on gloves, face masks, clothes and towels seized from the premises during the raid, the defence submitted that it was not something incredible to find their DNA because they were present therein when arrested. More pertinently according to the defence, the DNA analysis was done in contravention of ss 2 and 14 of the DNA (Identification) Act 2009 and regulations made thereunder because the DNA intimate blood sample of the three accused person used for comparison purposes were not obtained with their consent as prescribed therein. As such, the DNA identification could not be relied upon by the prosecution following the Court of Appeal case of *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460.

Be that as it may, the defence also contended that it is unsafe to rely on the findings of the DNA analysis because DNA of unidentified individuals was also seen in the items analysed following *Public Prosecutor v Anya Michael Onyedikachi* [2017] MLJU 371 and the Court of Appeal cases of *Karthi a/l Gopal v Public Prosecutor* [2016] 5 MLJ 274 and *Shreedharan a/l Thankamani v. Public Prosecutor* [2016] MLJU 1695. Nonetheless no investigation was thoroughly carried out by the prosecution to negate or explain the accessibility of others whose DNA was also found in the items analysed.

[26] Finally, the defence contended that the prosecution failed to adduce sufficient evidence to prove that the three accused persons were involved in the manufacturing of the drugs in the premises. At the time of the arrest, SP7 conceded that all the accused persons were not in the course of processing the drugs. Reference was made to the case of *Lee Boon Siah & Ors v Public Prosecutor and other appeals* [2014] 2 MLJ 652; [2014] 3 CLJ 584 where it was held that the expert evidence of a chemist is essential to conclude that the premise is a drug manufacturing or processing laboratory.

[27] In the circumstances, the defence therefore submitted that the prosecution has not successfully made out a prima facie case against all the three accused persons and they must be acquitted without their defence called.

FINDINGS OF THE COURT AT THE CLOSE OF THE PROSECUTION'S CASE

[28] My duty at the close of the prosecution's case is set out in s 180 of the Criminal Procedure Code which states:

> 180 Procedure after conclusion of case for prosecution:
>
> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.
>
> (4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[29] In the Federal Court case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 AMR 321, Augustine Paul JCA (later FCJ) explained prima facie case as follows at pp 315–316 (MLJ); pp 338–339 (AMR):

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can only be overthrown by evidence in rebuttal ... The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the

answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

[30] Consequently, I am required to conduct a maximum evaluation test on the prosecution's evidence here including the assessment of the credibility of witnesses called by the prosecution and drawing inferences admitted by the prosecution. If the prosecution's evidence admitted two or more inferences, the one that is more favourable to the defence is generally to be accepted unless the silent or circumstantial evidence otherwise discloses a compelling inference that points to the guilt of the accused: see *PP v Mohd Radzi Abu Bakar* [2006] 1 CLJ 457.

[31] In *Public Prosecutor v Kua Tiong Ann* [2015] 4 MLJevi 168; [2009] 7 AMR 788, Vernon Ong Lam Kiat JC (now JCA) held it is necessary for the prosecution to prove the following elements to secure the conviction of an accused person in respect of a charge pursuant to s 39B of the Dangerous Drugs Act 1952 ('the Act'):

(i) the drugs involved must be a dangerous drug as listed in the First Schedule of the Act;

(ii) the drugs were in his possession; and

(iii) he was trafficking the drugs.

Consequently, all three elements that constituted the offence must be sequentially proved by the prosecution one after the other. In addition, the prosecution not also prove there was common intention amongst them to traffick the drugs.

[32] As for the charges pursuant to ss 6 and 12 of the Act, the prosecution must prove the aforesaid elements (i) and (ii) only save that in respect of s 6 of the Act, the drug involved is raw opium, coca leaves, poppy-straw or cannabis. In addition, the prosecution must prove there was common intention amongst them to possess the drugs.

[33] As to the first element of the offence, the prosecution must prove that the charges were founded upon and reflected the drugs that were actually discovered and seized at the raid in the premises. The identity of the drugs must therefore be accounted for at all times right from the time of their discovery and seizure to their analysis and ultimately to their production in court as proof including their intermittent storage. In other words, there must not be a gap in the chain of evidence in respect of the movement of the drugs.

[34] In the Federal Court case of *Zaifull bin Muhammad v PP and another*

appeal [2013] 2 MLJ 348; [2013] 2 CLJ 383, Arifin Zakaria CJ held as follows:

> [33] In the present case, there are two material discrepancies that is as to the number of 'ketulan' and as to the gross weight of the cannabis. Both these discrepancies were never explained by the prosecution, save to say that the charged referred to by the learned counsel was the original charge, and the charge was later amended to read as trafficking in 799.4g of cannabis. It was further contended by the prosecution that since the amended charge is based on the net weight, therefore, any discrepancy in the gross weight is immaterial.
>
> [34] The prosecution further argued that based on the evidence before the court, there is no break in the chain of the evidence with regard to the drug exhibit. The prosecution submitted that all the relevant witnesses called by the prosecution had positively identified the drug exhibit based on the contemporaneous markings made by the witnesses. On that premise, the prosecution contended that the discrepancies do not create any doubt in the identity of the drug exhibit.
>
> [35] With respect, we could not agree with the prosecution on this issue. We are of the view that, in the circumstance of this case, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, this created a reasonable doubt as to the identity of the drug exhibit. In the circumstance, the defence should not have been called at the close of the prosecution case.

[35] From the evidence adduced by the prosecution, the case materials including the drugs were found in the premises at four different locations and marked respectively by SP7, to wit:

(a) floor of the living room at the first storey: A1–A9;

(b) store room beneath the staircase at the first storey: B1–B4;

(c) table top and beneath and on the floor in the hall at the second storey: C1–C52; and

(d) right bedroom at the second storey: D1–D19.

[36] According to SP1, the photographer who shot the photographs in exh P7 (1–27), he arrived at the premises with SP9 after midnight on 5 March 2014. He testified as follows at the trial under examination in chief:

> Q: Setelah terima arahan daripada Inspektor Haslina ada lans koperal pergi ke tempat kejadian itu?
>
> A: Ya ada saya pergi bersama dengan Inspektor Haslina.
>
> Q: Pukul berapa sampai di tempat kejadian?
>
> A: Saya sampai di tempat kejadian lebih kurang jam 1.15 pagi.
>
> Q: Jadi boleh ceritakan apa yang berlaku di tempat kejadian?

A: Saya ambil gambar di tempat kejadian atas arahan Inspektor Haslina bersama tagging forensik.

Q: Jadi di tempat kejadian siapa yang beri arahan untuk mengambil gambar?

A: Atas arahan pegawai penyiasat Inspektor Haslina.

Q: Masih boleh cam lagi gambar yang di ambil di tempat kejadian?

A: Ya masih boleh cam.

Q: Ada berapa keping gambar yang di ambil di tempat kejadian?

A: Sebanyak 27 keping gambar, YA.

SP7 testified as follows at the trial under examination-in-chief:

Q: Semasa ASP dan pasukan jalankan pemeriksaan dalam rumah itu bagaimana keadaan barang-barang kes itu?

A: Semasa pemeriksaan di jalankan keadaan barang-barang kes adalah terbuka atas lantai dan boleh dinampak dengan terang.

Q: Yang ASP nampak itu di dalam apa, bekas apa-apa?

A: Boleh dinampak secara terang di atas lantai barang kes yang saya jumpa. Tidak di tutup dengan benda-benda yang ... maksud saya tidak selindung.

Q: Begitu juga dengan tingkat atas?

A: Ya, YA.

...

Q: Seterusnya ASP ada mengatakan juga ada barang-barang kes yang dirampas daripada stor bawah tangga. Daripada gambar mana yang menunjukkan barang-barang kes dirampas daripada stor bawah tangga?

A: Gambar no 12 pintu sebelah kanan merupakan pintu masuk ke dalam stor bawah tangga.

Q: Dan gambar yang menunjukkan dalam stor ada?

A: Tak ada, YA.

Q: Yang ASP kata dijumpai di bawah lantai?

A: Di bawah meja boleh ditunjukkan melalui gambar 20 dan 22.

Q: Dan ada satu lagi di atas bilik sebelah kanan di tingkat atas, pada gambar yang mana menunjukkan bilik tersebut?

A: Tak ada gambar.

Under cross-examination, SP7 testified as follows:

Q: Saya rujuk tuan kepada P7, rujuk gambar no.22, setuju dengan saya menunjukkan tempat ketiga ada dadah di atas meja, di bawah meja di tingkat atas, ya betul?

A: Ya, betul.

...

Q: Saya katakan kepada tuan sebenarnya dadah berbahaya di dalam kes ini bukan dalam keadaan terbuka apabila tuan melakukan serbuan di kempat-empat tempat, setuju atau tidak setuju?

A: Tidak setuju, YA.

[37] I have examined the photographs in exh P7 (1–27) very carefully particularly photographs Nos 10, 11, 19, 20 and 22 therein.

It is plain that the drugs that were supposedly found on the floor of the living room at the first storey of the premises and seized therefrom are nowhere seen in photographs 10 and 11.

In addition, there were several packages or packets of presumably the drugs supposedly recovered seen on the table top in the hall at the second storey in photographs 20 and 22. Nothing is however seen in the photographs of the drugs supposedly found beneath the table. Only several basins that presumably contained the drugs supposedly found on the floor and seized can be seen in photograph 19. The number of basins therein cannot however be conclusively ascertained from the photograph.

The case materials particularly the supposed drugs seen in these photographs Nos 19, 20 and 22 were all unmarked. This is unexplained if not also inconsistent with the following testimony of SP7 at the trial under cross-examination:

Q: Sewaktu tuan membuat penandaan dalam rumah tuan dah selesai buat baru forensik sampai ke atau semasa tuan sedang buat pasukan forensik sampai?

A: Saya membuat penandaan selepas forensik sampai. Saya tunggu pasukan forensik sampai dulu baru buat penandaan.

Q: Forensik sampai dulu letak nombor 1, 2, 3 di keliling rumah dahulu dan kumpul bukti DNA punting rokok dan sebagainya dulu, betul?

A: Ya, betul.

Q: Setuju dengan saya apabila forensik mengumpul bukti forensik, gambar forensik juga diambil dahulu waktu itu?

A: Setuju, Y.A.

Q: Forensik perlu melakukan kerja mereka dahulu sebab kita tidak mahu ada kontaminasi di tempat kejadian, betul?

A: Setuju, Y.A.

Q: Dan selepas forensik selesai semua baru tuan dan pasukan tuan membuat penandaan dan list down barang-barang dalam rumah tersebut, betul?

A: Betul, YA.

That notwithstanding, the quantity of the unmarked packages or packets of the drugs supposedly found on the table top and seized therefrom as seen in exh P7 (1–27) photograph 22 do not however tally with the eventual marked packages

A or packets seen in exh P9 (1–72) photographs 22 and 23. There were six instead of eight packages or packets seen when the former is compared with the latter.

Finally, there is no photograph whatsoever seen in respect of the drugs that were supposedly found in the right bedroom at the second storey and seized therefrom.

B

[38] As submitted by the defence, KC Vohrah J (later JCA) held as follows in *Public Prosecutor v Wong Moy* with emphasis added by me:

C *Now 'X' was marked near the kitchen in the sketch plan and this point 'X' was pointed out by Khabri and Inspector Mohd Yusof to have been the place where the accused was arrested. Why was no photograph taken of this place? Instead the photographs showed the rubbish chute and the rubbish chute, it is in evidence, is near the two toilets*. And it is the evidence of the accused that the police were near the toilet where they called her out of the room. Having confidently identified the point 'X' as the place of arrest,
D Inspector Mohd Yusof again confidently and clearly replied under cross-examination, 'I arrested her at place marked 'X' in the sketch'. Khabri under cross-examination was asked 'Who showed the point 'X?' He replied, 'I brought Inspector Razali the IO to the scene and I pointed out the place where the accused was arrested'. However when he was shown photographs P28B, C, D and E he had
E to agree that none of them showed the place marked 'X', the place where the accused was arrested. He then instead marked the place of arrest in P28C which shows the corridor leading to the rubbish chute not the kitchen. And he said, 'Sketch plan is wrong — from the front door one can see directly to the place where the accused was arrested'. *I find these discrepancies in the light of the defence troubling*.

F ...

To sum up. The investigations in this case have been most unsatisfactory conducted and the DPP indeed conceded that the investigations by the IO were not up to the mark. The blemishes in the prosecution's case have become accentuated, and more blemishes have been revealed, in the light of the totality of the evidence. The
G evidence of PW4 and PW5 with their inherent inconsistencies and their inconsistencies when viewed against the police report, the sketch plan, the evidence of the IO and the defence leave me in a state of doubt as to what actually took place that night. The cardinal principle enshrined in the law of our country is that the onus of proving guilt of an accused is throughout on the prosecution and if upon the whole evidence the court is left in a real state of doubt, the prosecution has failed to
H satisfy the onus of proof which is upon it (see *Mat v PP* [1963] MLJ 263). To my mind the accused has succeeded in raising a reasonable doubt on the prosecution's story that she was in possession of the drugs. In the event I do not have to consider the rebuttable presumptions raised under ss 37(d) and (da) of the Dangerous Drugs Act 1952. Accordingly I acquit her of the charge.

I

[39] Likewise in this case, SP7 confidently marked 'Y' in exh P7 (1–27) on photograph 10 where the drugs were found on the floor of the living room in the first storey of the premises. Upon careful examination, there was however no drugs seen in the same photograph at all in contrast to some drugs seen in

photographs 19 and 20 on the table top in the living room at the first storey of the premises. The discrepancy was neither explained by SP7 nor SP9.

[40] Furthermore in *Pendakwa Raya v Davoud Fotoohigharehmasjed Shaban*, Amelia Tee J held as follows with emphasis added by me:

> [66] *As the investigating officer, PW10 had arranged for photographs to be taken of the exhibits as well as of the scene. The court notes that only one photograph (P6) was taken of the exhibits*. This photograph shows the organisers and the six plastic bags of drugs. No photographs were taken of the many other exhibits, especially the green retractable blade ('pisau tolak') which is a very material exhibit.
>
> [67] Similarly the photographs taken of the scene (P7A-J) could have been better done. No photographs were taken of the CCTV room where surveillance of the 5th floor was carried out. *Neither was any photograph taken of the reception counter where the accused allegedly took delivery of the DHL box containing, inter alia, the three organisers and the six plastic bags of drugs*. In this case, PW10 had not drawn a sketch plan of room 506 depicting the various spots in the room where the various exhibits were recovered. In the absence of a sketch plan, photographs taken of relevant areas of the hotel and the room would have given added insight to the court of the scene.
>
> ...
>
> [83] At the end of the prosecution case, the court has carefully considered the evidence adduced by the prosecution. The court has evaluated the evidence of the prosecution witnesses to determine if the defence should be called. *The court finds that apart from the many smaller but valid issues which have been raised by the defence, the most important and pertinent is the doubt that has been raised in relation to the identity of the exhibits in this case* ...

[41] In the circumstances herein, I am of the opinion that the failure of the police particularly the raiding officer and the investigating officer in taking and tendering photographs depicting the exact existence of all the drugs found and seized in the premises seriously weakened the prosecution's case against all the accused persons. They were, at the least, expected to explain to the court as to why several but incomplete photographs were taken only. No explanation was proffered. In *Mohd Zaidy Adenan v Public Prosecutor*, Su Geok Yiam J explained as follows:

> [63] There was no explanation from PW6, let alone, a reasonable explanation, for his failure to instruct a police photographer to take photographs of the parang and the modified iron pipe. His omissions have left serious gaps in the prosecution's case. The gaps created a doubt whether the sworn oral testimonies of the prosecution witnesses concerning the use by the appellant of the parang, P1, in his attempt to rob PW1 were inherently credible or probable.

I share Her Ladyship's views and in consequence SP7's testimony on the drugs seized here may not be inherently credible or probable. There could have been mix-up or tempering of the drugs found and seized from the premises.

[42] In the absence of the prosecution producing satisfactory affirmative proof and exact accounting of the drugs seized from the premises that were eventually analysed and formed the basis of the charge, I find there is reasonable doubt in the prosecution's case. The first charge that is based on heroin and monoacetylmorphines allegedly found at three locations in the premises could not be entirely accounted from the photographs adduced by the prosecution.

Likewise the second charge and third charge based on cannabis and methamphetamine allegedly found on the floor in the living room at first storey of the premises could not be seen at all from the photographs adduced. In other words, the exact and true amount of drugs seized is indeterminate. It is therefore unsafe to even charge, let alone, convict the accused persons on the evidence adduced by the prosecution on the identification of the drugs as charged.

[43] Put simply, I find there was a serious break in the chain of evidence led by the prosecution. The consequence is grave. In the Supreme Court case of *Teoh Hoe Chye v PP; Yeap Teong Tean v PP* [1987] 1 MLJ 220, Abdul Hamid CJ (later LP) held as follows:

> Insofar as the trial court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi*'s case).
>
> We would observe at this point that the law is clear in that 'it is unnecessary to call evidence to ensure there is no break in the chain of evidence' (*Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75). But where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. In the instant case there was such a failure.
>
> ...
>
> In our view, it was clear that in the particular circumstances of this case, the failure to call this witness had caused a serious break in the chain of evidence relating to the identity of the exhibits. The break was so serious that we do not think there is any statutory cure. We would add that any attempt in such a case to apply the provisions of s 60(1) of the Courts of Judicature 1964, we would amount to relaxation of the law of criminal procedure to such an extent as to deprive an accused person of his right. In this regard, it behoves us to reiterate that 'the requirement of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else and therefore the appeal must be allowed and the conviction quashed ...

[44] In the premises, it is futile and unnecessary for me to make further finding on the subsequent analysis of the drugs by the chemist in respect of the first element of the offence.

[45] I therefore hold that the first element of the offence on the identity of the drugs has not been satisfactorily established by the prosecution under maximum evaluation. There is a gap in the prosecution's case.

[46] In consequence of the aforesaid infirmities in the prosecution's case and following *Public Prosecutor v Wong Moy*, it is also futile and unnecessary for me to make further findings on the second and third elements of the offence on possession and trafficking of the drugs in respect of the three charges.

CONCLUSION

[47] For the foregoing reasons, I therefore order the discharge and acquittal of all the three accused persons on the first, second and third charge.

Accused persons discharged and acquitted on first, second and third charges.

Reported by Fatin Mohd Ismail